

SERVED: October 16, 2007

NTSB Order No. EA-5327

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. § 800.24)
on the 16th day of October, 2007

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18088
v.)	
)	
LEONARDO C. LOPES,)	
)	
Respondent.)	
_____)	

ORDER DISMISSING APPEAL

Respondent has submitted a request to file a late appeal, seeking to appeal the written order of Administrative Law Judge Patrick G. Geraghty, served in this proceeding on September 18, 2007. By his order, the law judge granted the Administrator's motion for judgment on the pleadings.¹ For the reasons set forth below, we dismiss the appeal of the law judge's order as untimely filed.

Background

The Administrator served an emergency order of revocation on respondent on August 27, 2007, from which respondent, through his representative, filed a timely notice of appeal.² The notice of

¹ A copy of the law judge's order is attached.

² The emergency order of revocation alleged that respondent violated 14 C.F.R. § 67.403(a), Federal Aviation Regulations, by

appeal used the representative's address. On August 30, 2007, the Administrator filed the complaint, and on that same day, respondent filed a timely answer, using the representative's address again, but this time with an incorrect zip code. Based on respondent's answer, the Administrator filed a motion for judgment on the pleadings. Respondent's reply to that motion for judgment used respondent's address. In a decisional order, the law judge granted the motion for judgment on the pleadings, and the law judge's office mailed that order to respondent's representative, using the address from respondent's answer, the one with the representative's incorrect zip code. The law judge's office also sent the order by facsimile to the fax number previously provided in respondent's answer to the complaint.

The law judge's order, granting the motion for judgment on the pleadings, affirming the Administrator's emergency order of revocation, and terminating the proceedings, included a page explaining appeal rights. The explanation indicated that any party could appeal the order by filing a written notice of appeal, in accordance with the Board's Rules of Practice, within "2 days"³ (emphasis in original) of the date on which the order was served,⁴ and that the date of service appeared on the first page of the order. That date was September 18, 2007; therefore, any appeal was due by September 20, 2007. On September 24, 2007, respondent's representative filed, by facsimile, a notice of appeal and a request to file late appeal.

In his request to file late appeal, respondent states that the incorrect address used by the law judge's office to serve the law judge's decisional order "delayed" the delivery of the order. The Administrator filed a motion to dismiss the notice of appeal as untimely, and respondent replied to that motion.

(..continued)

making a fraudulent or intentionally false statement on an application for a medical certificate.

³ See 49 C.F.R. § 821.57(a).

⁴ The law judge's decisional order is "deemed filed ... for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark." See 49 C.F.R. § 821.7(a)(4) and § 821.8(b)(2) ("...law judges' appealable orders ... shall be served by the Board on parties other than the Administrator by certified mail"). The date of service is "determined in the same manner as the filing date is determined under § 821.7(a)(4)." See 49 C.F.R. § 821.8(e).

Discussion

Respondents must demonstrate good cause for tardiness in filing notices of appeal and appeal briefs if they wish to avoid mandatory dismissal.⁵ Although respondent indicates that the incorrect address "delayed" delivery of the law judge's order, respondent does not indicate the length or duration of any "delay." He does not indicate whether he actually received the law judge's decisional order on or before September 20, 2007, in which case he could have submitted a timely notice of appeal. The FEDEX tracking label, provided by respondent as an attachment to his request to file late appeal and his response to the Administrator's motion to dismiss, indicates the package was received on September 19 – the day before a notice of appeal was due. In addition, included in the administrative case file is a "Message Confirmation," indicating a successful facsimile transmission to respondent's representative on September 18.⁶

The Board has repeatedly emphasized the importance of keeping the Board and the FAA apprised of a current address.⁷ Although most other cases involve addresses in FAA official airman records, the same idea extends to accuracy, consistency, and currency of addresses provided in pleadings before the Board.

The failure to exercise care in this regard certainly contributed to, if not caused, the situation that resulted in a "delay" in delivery of the order here.⁸ The law judge's office mailed the order by the same carrier and to the same address⁹ as a previous order granting the Administrator's motion to shorten the time to reply. The law judge's office also sent both via facsimile. As a result, respondent was fairly on notice at that time that he had provided the law judge's office an incorrect address.

⁵ See e.g., Administrator v. McKinney, NTSB Order No. EA-5284 at 1, 4 (n.4), 5 (2007); Administrator v. Mace, 7 NTSB 478 (1990); and Administrator v. Hooper, 6 NTSB 559, 560 (1988).

⁶ See Administrator v. Bevan, NTSB Order No. EA-5126 (2004) (fax confirmation sheet is indication of successful transmission).

⁷ Administrator v. Mazufri, NTSB Order No. EA-5289 at 2 (2007); Administrator v. Windwalker, NTSB Order No. EA-4671 (1998); Administrator v. Rourke, NTSB Order No. EA-4186 at 2 (1994); Administrator v. Thibodeaux, NTSB Order No. EA-4144 at 1-2 (1994); and Administrator v. Hayon, 4 NTSB 773,774 (1983).

⁸ See Administrator v. Sepulveda, NTSB Order No. EA-5229 (2006) ("...the delay ... was of respondent's own making").

⁹ Again, the address given in respondent's answer to the complaint.

Respondent has not demonstrated good cause for the untimely filing of his notice of appeal. He has the burden of overcoming or explaining the evidence of actual notice – the Federal Express label and the facsimile transmission report. Respondent has failed to do so. He has not alleged that he did not receive the law judge's order in time to submit a timely appeal; he only alleges that delivery was "delayed."

At any rate, evidence in the administrative record indicates that respondent received the law judge's decisional order on both September 19, 2007 (indicated delivery by Federal Express), and on September 18, 2007 (successful facsimile transmission). But respondent did not file a notice of appeal until Monday, September 24, 2007. Assuming for purposes of argument that respondent did not receive the law judge's order until September 19, 2007, even then an extension of the deadline would arguably not have been warranted, because all he had to do was to indicate, in writing, that he intended to appeal the law judge's decision. He could have done so that day or the next, and he would have been timely.¹⁰

Conclusion

The law judge found that, as to sanction, the Board has held that intentional falsification is grounds for revocation of an airman certificate.¹¹ He, therefore, affirmed the sanction.

Respondent's notice of appeal is untimely, and he has not demonstrated good cause for his untimeliness.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's notice of appeal is dismissed.

Gary L. Halbert
General Counsel

¹⁰ See Administrator v. DeLuca, NTSB Order No. EA-5158 at 2 (2005); Administrator v. Croll, NTSB Order No. EA-5009 at 2 (2002).

¹¹ See Administrator v. Hodges, NTSB Order No. EA-5303 at 4-5 (2007); Coughlan v. NTSB, 470 F.3d 1300, 1306 (11th Cir. 2006); Administrator v. Brassington, NTSB Order No. EA-5180 at 6 (2005) ("...airman who falsifies required documents lacks qualifications to hold an airman certificate"); Administrator v. Croll, NTSB Order No. EA-4460 at 7 (1996).